No. 22,050

IN THE

United States Court of Appeals

For the Ninth Circuit

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

THE TRIAL COURT'S CONCLUSION THAT THERE WAS CONTRIBUTORY FAULT ON THE PART OF THE "ROTTI" WAS BASED ON ITS CONCLUSION THAT THE "MAJOR-MINOR FAULT" RULE WAS INAPPLICABLE AS A MATTER OF LAW. THIS COURT ACCORDINGLY SHOULD REVIEW THESE RELATED CONCLUSIONS INDEPENDENTLY AND IN SUCH REVIEW IT IS NOT BOUND BY THE "CLEARLY ERRONEOUS" RULE (Answering Argument I, Appellee's Br., pp. 7-8).

The Appellee did not present any material witnesses its own. There, accordingly, is no conflict in the evi-ence as to the relevant navigational facts and, except as scussed below, there is no dispute as to the facts. he primary question presented by the appeal is whether ie trial court applied the proper standard in holding iat there was contributory fault on the part of the Rotti" despite the concededly gross fault on the part the "Tuttle". Although a finding of negligence is nor-

mally treated, in this Circuit, as a factual question, th matter of the standard applied involves a conclusion o law. *Rederi A/B Soya v. SS Grand Grace* (9 Cir. 1966 369 F.2d 159, 163, but in this case even if the conclusio of fault be treated as a factual matter, it is respectfull submitted that this Court on review will be left with th conviction that the trial court's conclusion was clearl erroneous, within the most stringent application of th rule of *McAllister v. United States* (1954) 348 U.S. 19.

It is evident that the trial court accept Appellee' urging that the statement in *Union S.S. Co. of New Zea land Ltd. v. Standard Oil Co. of California* (W.D Wash. 1945) 60 F.Supp. 538 (C.T. 88) [to the effect tha one vessel having admitted fault, the sole question fo consideration is whether the other vessel was at fault] justified it in rejecting the American "major-mino fault" rule, which has consistently been stated by th United States Supreme Court, and in consequence, erro neously, applied a standard which in effect cast upon th "Rotti" the improper burden of proving the reasonable ness of her own conduct.

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2. APPELLEE'S BRIEF IN THIS COURT CONTINUES THE MIS LEADING PRACTICE, SUCCESSFUL FOR IT IN THE TRIA COURT, OF CITING RULE 16(b) CASES AS CLAIME SUPPORT FOR ITS DEFINITION OF "MODERATE SPEED UNDER RULE 16(a). (Answering Argument IA, Appellee's Br pp. 9-14).

Rule 16(b) (33 USC §145n(b)) stated the mandatory non-discretionary requirement that:

> "(b) A power-driven vessel hearing, apparently for ward of her beam, the fog-signal of a vessel the po

> sition of which is not ascertained, shall, so far as the circumstances of the case admit, *stop her engines, and then navigate with caution* until danger of collision is over." (Emphasis supplied).

This is as distinguished from the general requirement of Rule 16 (a) that a vessel proceeding in fog shall "go at a moderate speed" (33 USC §145n(a), Appendix II, Appellant's Opening Brief). The distinction between the two rules was clearly stated in *Lie v. San Francisco & Portland SS Co.* (1917) 243 U.S. 291, 296:

> "The most cursory reader of this rule must see that while the first paragraph [16(a)] of it gives to the navigator, discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph [16(b)] is imperative . . . ."

of which Appellee was made aware before the trial court (C.T. 173) and before this court (Appellant's Opening Brief, 14-15).

Appellee nonetheless persists in urging upon this court, as it did upon the trial court, cases which in true fact are concerned with application of the requirement under Rule 16 (b) that a vessel falling within the rule must "stop her engines, and then navigate with caution" as if such cases were determinative of Rule 16 (a)'s "moderate speed" which the Supreme Court in *Lie* confirmed is necessarily largely left to the navigator's discretion.

Each of the eight cases cited on pages 8 and 9 of Appellee's brief actually involved a Rule 16 (b) factual situation where the navigation the court was considering occurred after the vessel found at fault had heard, or should have heard, a fog signal forward of her beam.

This is so, even of *The Silver Palm* (9 Cir. 1937) 94 F 2d 754, 759 whose name Appellee uses to dignify its otherwise unsupported contention that moderate speed under 16 (a) requires that a vessel, without exception, be able to stop within one-half the range of visibility.

We submit that Appellee's contention as to the "half sight rule", although accepted by the trial court, has never been the law in this, or any circuit, and that when Appellee presses the contention to the point, as it does of urging that the information available through an alertly manned radar is not a "circumstance" under 16 (a) which the navigator may consider (and which the court must consider in judging the navigator's conduct) the contention falls directly afoul of this court's holding in *The Beaver* (9 Cir. 1918) 253 F. 312, 315. Similarly Appellee's use of *Afran Transport Company v. The Bergechief* (S.D.N.Y. 1959) 170 F. Supp. 893, *aff'd* (2 Cir. 1960) 274 F. 2d 469 (a case dealing with the mandatory requirement under Rule 16(b) to stop engines after hearing a fog signal) as if it might validly be read as dealing with the relationship of radar to the determination of "moderate speed" under Rule 16(a), [Appellee's Br. pp. 11, 12] requires that this court be acutely alert to verbal distinctions of a higher than ordinary level of sophistication.

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3. APPELLEE'S ATTEMPT TO DISTINGUISH THE ANALOGOUS "GEORGE N. SEGER/WAIPAWA" IS WITHOUT SUBSTANCE (Answering Argument IB1, Appellee's Br., pp. 15-16).

Appellee suggests at page 16 of its brief that Judge Learned Hand's opinion in *United States v. Shaw, Savill & Albion Co.* (2 Cir. 1949) 178 F.2d 849, is not

nalogous because there was no evidence from which the "Waipawa" could have determined that the other vessel ad altered its course toward her. In fact, as is discussed t page 851 of the official report:

> ". . . changes in The Seger's course could be detected only by variations of the distance between the range lights. The after light was at least fifteen feet above the forward one, and if the mast [sic] were a hundred feet apart, at the distance of a quarter of a mile they would have been only two or three degrees apart. We are not prepared to hold that it is evidence of an insufficient watch not to detect variations in so small an angle, and that was all that could advise The Waipawa of The Seger's edging in upon her course."

hich, at page 852 of the official report, Judge Hand urther elucidated:

> ". . . as we have already said, The Seger had an unusually heavy burden of proof, and she did not call any witnesses to show that the bank of city lights did not have the effect which The Waipawa's witnesses said that it did."

While the "Rotti's" radar disclosed the relative movement of the "J. H. Tuttle" through the water, the radar would not, on a usual observation, disclose the actual heading of the "Tuttle". Thus the "pip" of the "Tuttle" s observed on the "Rotti's" radar is in the same situation as the angle of the range lights of the "George N. Seger" as observed by the "Waipawa", and the analogy f the two cases remains as perfect and complete as can e found in the books. [The fact that the *Seger/Waipawa* ase is a night-time collision, but not involving fog, points

up the fact that the fog in the present case is in reality more a diverting circumstance than a cause of the collision, which would have resulted from the "Tuttle's" U-turn back into the thoroughfare, regardless of the weather conditions.]

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4. APPELLEE CONCEDES THAT THE TRIAL COURT [ERRONEOUSLY] HAS IMPOSED STATUTORY DUTIES ON THE "ROTTI", EVEN THOUGH NOT EFFECTIVE AS LAW AT THE TIME OF THE COLLISION (Answering Argument IB2 Appellee's Br., pp. 8-20).

Rule 16 (c) and the Radar Annex to the rules (Appendix II to Appellant's Opening Brief) were not in effect at the time of the collision. The annex, which does not purport to establish arbitrary conventions or rules of the road, was widely distributed several years before the collision and regarded by mariners as a guide to good seamanship in the use of radar (C.T. 175). It, and the fact of adoption of Rule 16 (c), were referred to by both parties during the conduct of the trial. Appellant appended a copy of the annex to its trial memorandum (C.T. 130) and the opening remarks of Appellant's counsel on the subject, to which Appellee refers in its brief, were (R.T. 11-12):

> "I concur in the comments concerning what are sometimes called the radar amendments to the rules. The primary effect of the radar amendments, that is, amendments to Rule 16(a), and the addition of the annex to the rules, a copy of which is attached to the ROTTI's trial memo, is to make express in the statute that which virtually all courts had come to recognize as the—as a proper matter in any event, and that is that in construing and applying

Rule 16(a) and the determination of what is a moderate speed and what is caution, the fact of the radar information and of the use of radar is a circumstance to be considered. And when determining moderate speed, the fact that a vessel does have radar information available will, in most circumstances, justify a somewhat higher speed than would be the case for a ship without radar. On the other hand, as the annex points out, there are some situations, and this is not one of them, where radar information would require a lower speed. For example, where radar discloses the presence of small boats which would not have been known to a ship without radar."

Appellant, under the governing law, was not required , and did not attempt to brief Rule 16 (c), its statutory story or its proper construction insofar as it stated nperative duties in the nature of rules of the road. The ial court nonetheless applied it as if it were a statute effect which Appellant had breached (although this as not an issue in the case) imposing upon Appellant e burden under the *Pennsylvania* (1873) 19 Wall. (86 .S. 125), of proving that its actions not only did not ut could not have contributed to the collision.

As Appellee states (Appellee's Br. p. 20):

"Thus, the District Court first determined that Rule 16 (c) imposed a duty to remain at stop until the risks of collision were over."

In making this concession, Appellee finally gives recogition to the fact that its urging of *Afran Transport ompany v. The Bergechief* (S.D.N.Y. 1959) 170 F. Supp. 03, *aff'd* (2 Cir. 1960) 274 F.2d 469 involving a Rule

16 (b) factual situation, accepted by the trial court as guide for judging the moderateness of the "Rotti's speed in this Rule 16 (a) case, was an error whic Appellee cannot defend before this Court.

As a matter of fact, the "Rotti" met the requirement of Rule 16 (c); her engines were on "stop" or on "fu astern" at all times that there was "risk of collision" i.e., at all times except those times when the "Tuttle's course was carrying her to pass clear or carrying he away from the channel [Rule 16 (c) is not to be rea as requiring radar-equipped vessels proceeding in or ou of the San Francisco main ship channel to "stop" whe observing another vessel on radar].

The point, however, is that the "Rule 16 (c) case" i not the case which was tried, the Rule was not law, and i was error for the trial court to accept Appellee's urging that the imperative arbitrary mandates of Rule 16 (c) not in effect as law, be treated in the same manner as th imperative mandates of Rule 16 (b), which was law bu which was not violated by the "Rotti".

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5. APPELLEE'S SUPPORT OF THE TRIAL COURT'S REFUSA TO APPLY THE "MAJOR-MINOR FAULT" RULE TO TH "ROTTI" IS WITHOUT LEGAL BASIS (Answering Appellee' Argument IIA, Appellee's Br., pp. 21, 22).

Appellee's brief at page 21 clearly discloses the struc ture of the case it urged upon the trial court, which wa accepted by the trial court, and correspondingly disclose the basic error of that structure.

Although a Rule 16(b) factual situation was not pre sented, and there was no violation of Rule 16(b) by th

Rotti'', Appellee urged upon the Court and the trial ourt accepted, language from cases dealing with Rule 6(b) factual situations as support for its contention that here had been a violation of Rule 16(a), which was nen further bootstrapped into the category of a statutory iolation, to deprive the ''Rotti'' of application of the major-minor fault'' rule.

The unfair and misleading nature of Appellee's approach, as well as the error of the trial court's conclusion, is perfectly demonstrated at page 22 of Appellee's rief where Appellee quotes language from *Lie v. San 'rancisco & Portland SS Co.* (1917) 243 U.S. 291, 298 s purported support for Appellee's proposition that a violation of Rule 16 in fact did contribute to the collision.'' The unfair inappropriateness of Appellee's argument and of its citation of the *Lie* case is subtle, nd becomes manifest only when it is pointed out that ne language which Appellee quotes deals directly with a iolation of Rule 16(b) and that the Supreme Court in he *Lie* case itself took pains to declare the major difference in nature between the imperative instructions of Rule 16(b), with which it was there dealing, and the noderate speed requirement of Rule 16(a) stating, it 'gives to the navigator discretion as to what shall be moderate speed' in a fog . . .''.

6. INACCURACIES IN APPELLEE'S BRIEF WHICH MAY MISLEAD THE COURT.

A. The "Rotti" went on full astern at 1856 immediately whe the radar first indicated the "Tuttle" was turning back int the channel.

Appellee in its "Statement of the Case" and elsewher in its brief makes numerous references to the depositio testimony of Second Officer Planken (R.T. 59-90) wh was serving as radar observer, and his description o the changes of the radar pip representing the "Tuttle from 86° True to 81°, the bearing at the moment of coll sion (R.T. 67), as an indication that the "Rotti" wa sluggish in responding to radar information that th "Tuttle" had started to turn back into the channel. Ap pellee fails to mention the fact, necessary for a prope appreciation of Mr. Planken's testimony, that Mr. Planke was stationed at the radar with no other duties and com pletely surrounded by a black curtain (R.T. 61) in ac cordance with good practice to avoid distraction and th interference of daylight; the necessary corollary, how ever, is that Mr. Planken had no knowledge of the time relative to the radar sightings he reported, at which th "Rotti" changed engine speeds etc. The black curtain however, was such that Pilot Sever could, without inter fering with Second Officer Planken, make personal inter mittent observations of the radar screen, as he did when for example, Pilot Sever saw the "Tuttle" hovering out side of the channel south of buoy 6 and gave the 1854 "ful astern" order (R.T. 200, 19-24). The significant testimony and the only testimony which is effective to relate Secon Officer Planken's detailed testimony of his radar observa tions with the engine orders given by Pilot Sever i Planken's testimony (R.T. 87-89) that when the bearin

: the "Tuttle" pip began to reduce from 86°, he called
ıt the changes immediately recognizing that the "Tuttle"
ıd started to come back into the channel, in conjunction
ith Pilot Sever's testimony that when Second Officer
lanken said "the target is now coming back into the
ıannel", Pilot Sever gave the 1856 full speed astern
'der (R.T. p. 204, line 22-p. 205, line 4).

Appellee, and the trial court, overstate the claimed greater validity of measuring speed "through the water" as against "over the ground".

Appellee's brief (page 2, n. 1) in support of its con-
ntion that speed "through the water" is the only speed
hich matters, quotes the first half of a sentence which
ppears on page 582 of *Griffin on Collision*, the second
alf of which reads "if one of them is at anchor and
erefore unaffected by the current, while the other is
ıvigating, the latter's speed *over the ground* is the im-
ortant thing." (Emphasis in original). In the present
se, the navigation of the vessels was not only with re-
ect to each other, but also was (so far as the "Rotti"
as concerned, and should have been, so far as the
Tuttle" was concerned) with respect to a permanent
ıannel marked by fixed buoys, damaging which is con-
ituted a crime by the statutes of the United States (33
.S.C. §§408, 411). After the collision, the "Rotti" was
ifting westerly out of the channel, and Pilot Sever had
order "full ahead" to avoid contact with buoy No. 4
R.T. 213, 217, 218). In such circumstances, speed "over
ıe ground" cannot be deemed an irrelevance. There is
so considerable practical validity to the observation of
ıe District Court for the Northern District of California

in *The Walter A. Luckenbach* (N.D. Cal. 1924) 4 F.2d 5
aff'd (9 Cir. 1926) 14 F.2d 100:

> "Speed with the current is more culpable than spe
> against it, in that the ship in the latter situation
> capable of better control and quicker stop and ste
> way in its approach to the other ship; the vital fac
> being speed of approach, whether through water
> over the ground, by power or mere drift. A sh
> adrift in the current, like an auto down grade, mu
> apply brakes—reverse the propellers." (4 F.2d at 55

**C. Appellee's contention that any forward motion, even
slightest, of the "Rotti" would connote a violation of
"half-sight rule" is false as a matter of navigational phys
and tends to mislead this court, as it did the trial court.**

At pages 2 and 27 of its brief, Appellee urges that a
forward movement of the "Rotti" through the water
the time of collision would necessarily connote violati
by the "Rotti" of the so-called "half-sight rule" (whi
"rule" itself Appellant discusses in Section 2 above). W
believe the record is clear that the "Rotti" had no a
preciable headway at the time of collision (R.T. 20
and we suggest that the "Rotti" should be permitt
some slight headway through the water in view of t
fact that at any speed of less than 3½ knots through t
water she in fact would have been drifting backwards
the channel buoys which, under 33 USC §§408, 411,
was a criminal offense for her to hit.

Essentially, though, Appellee's assertion is whol
without foundation, and in fact is contrary to navig
tional mechanics. *Griffin on Collision,* at page 292, and t
sketch appearing at R.T. 155, each demonstrate wh
logic confirms, i.e., that a vessel proceeding so slowly th
she can stop within half her range of visibility, a

versing her engines on first sighting another vessel rough the fog, can still have some forward headway the time of collision, if the relative speed, and angle, the other vessel is such that it has used up more an its equitable half of the range of visibility by the me of collision.

There is no testimony of any material witness that e "Rotti" had used up her half of the range of visi-lity; conversely, Appellee's failure to produce any Tuttle" witnesses raises a persuasive presumption that e "Tuttle" preempted more than her share.

Appellee's continued misdescription of the path of a turning vessel through the water tends to mislead the Court.

At pages 25 and 26 of its brief, Appellant continues to ge, as it did before the trial court, that the motion of e "Tuttle" through the water in a hard starboard turn uld not serve to impale the "Tuttle" on the "Rotti's" w (assuming the "Rotti" to be motionless in still ater). Appellee suggests at page 26 of its brief that is result follows from the fact that the bow of a turning ssel remains on the inside of the turning circle which described by its midship pivot point. The fact of the atter is, as the reproductions from the diagrams in *night on Seamanship* (C.T. 155-c, 155-e), clearly demon-rate, that to the extent that the bow of the turning ssel is inside of its turning circle, the vessel's move-ent through the water is sideways and without the ap-lication of any other force, sufficient to impale its side any stationary object or vessel that may be standing ithin the ambit of its turning circle. At the trial, Ap-ellant's counsel expressed (R.T. 476) his belief in the

good faith of Appellee's trial counsel's failure to understand a ship's turning circle; the persistence of Appellee in this argument, after ample opportunity to study the subject, strains the limits of fair advocacy.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant's opening brief, it is respectfully submitted that that portion of the interlocutory judgment of the District Court holding the "Rotti" in mutual fault must be reversed, with instructions to enter an interlocutory judgment decreeing sole fault against appellee.

Dated: February 14, 1968

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCIS L. TETREAULT